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No. 07-280

IN THE
SUPREME COURT OF THE UNITED STATES

KURT H. EICHORN, *et al.*,
Petitioners,

v.

AT&T, *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Third Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

TERISA E. CHAW
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
44 MONTGOMERY STREET
SUITE 2080
SAN FRANCISCO, CA 94104
(415) 296-7629

STEPHEN BRUCE
805 15TH STREET, N.W.
SUITE 210
WASHINGTON, DC 20005
(202) 371-8013

Counsel for *Amicus Curiae*
NELA

MARY ELLEN SIGNORILLE*
AARP FOUNDATION LITIGATION

MELVIN R. RADOWITZ
AARP

601 E STREET, N.W.
WASHINGTON, D.C. 20049
(202) 434-2060

Counsel of Record*

Counsel for *Amicus Curiae*
AARP

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

AARP and the National Employment Lawyers Association (NELA) move for leave to file the accompanying brief *amici curiae* in support of the position of Petitioner, Kurt H. Eichorn, and those of the class he represents, whose case is before the Court on a writ of *certiorari* from the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Pursuant to Supreme Court Rule 37.3, consent of the parties to the filing of the brief was sought through counsel. Counsel for Petitioners gave consent, but counsel for Respondents withheld consent.

INTEREST OF *AMICI CURIAE*

AARP is a nonpartisan, nonprofit membership organization of over 39 million people age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older persons. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. Countless members participate in or receive employer-funded health, pension, disability, and other employee and retiree benefit plans. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pensions, health, and other employee benefits.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports

precedent-setting litigation affecting the rights of individuals in the workplace. NELA members have particular expertise in the issues raised in this action because they have represented employees in a number of cases involving ERISA § 510.

AARP and NELA are qualified to brief the Court on this matter, as they have participated as *amicus curiae*, both singly and jointly, in numerous cases involving remedies under the Employee Retirement Income Security Act (ERISA). *See, e.g.,Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004).

AARP's members, NELA members' clients and other participants in employee benefit plans rely on ERISA to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq.* In particular, they depend on ERISA's protections against an employer's intentional actions to deprive them of those benefits. Of particular concern for AARP and NELA is the ability of these participants to obtain meaningful recovery under ERISA's civil enforcement provisions. In this case, the discrete legal issue is whether equitable relief under § 502(a)(3), 29 U.S.C. §1132(a)(3), includes reinstatement to the plan to become eligible for benefits or the benefits lost due to the employer's illegal actions to interfere with their pension benefits. More broadly, the issue is whether relief under § 502(a)(3) includes a remedy other than a prospective injunction for an employer's intentional interference with retirement and welfare benefits.

Employees will have no meaningful remedy if they may be terminated to prevent them from obtaining benefits without the ability to obtain reinstatement into the plan or the lost benefits themselves, as here, or in other cases the inability to obtain front or back pay. *See Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1254-61 (10th Cir. 2004) (holding that back pay is not appropriate equitable relief under § 502(a)(3)). ERISA will not act as the deterrent to employers from terminating plan participants to interfere with benefits that Congress intended. Indeed, ERISA's anti-retaliation and anti-

discrimination provision will become superfluous. *Cf. Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869, 1874 (2006) ("that [position] would make § 502(a)(3)(B)(ii) an empty promise").

The decision in this case will have a direct and vital bearing on the economic security of AARP's members, NELA members' clients and other participants of employee benefit plans.

REASONS FOR GRANTING THE MOTION

The motion of AARP and NELA should be granted because the brief focuses on only one of Petitioners' questions.[1/] The brief of AARP and NELA not only presents a different way of analyzing the issue than that presented by Petitioners but also a broader outlook at what the outstanding issue before the Court is. Indeed, the reasons for granting the writ of *certiorari* shows the impact on AARP members and NELA members' clients.

A writ of *certiorari* is appropriate because there is a substantial conflict within the Third Circuit's own decisions, *compare Eichorn v. AT&T*, 484 F.3d 644, *reh'g en banc denied*, 489 F.3d 590 (3d Cir. 2007) (holding that participants may not recover losses directly caused by employer's actions, even if these actions violated ERISA) *with Gavalik v. Continental Can Co.*, 812 F.2d 834, 856 (3d Cir. 1987) (§ 510 is designed to redress and prevent injury to employees' protected rights); within the Sixth Circuit's own decisions, *compare Alexander v. Bosch Auto. Sys., Inc.*, 232 Fed. Appx. 491, 497-98 (6th Cir. 2007) (holding that a remedy requiring employer to place plaintiffs' names on a list of persons eligible to receive plant-closure benefits, even though the employer violated § 510 to deprive plaintiffs of such benefits, was not appropriate equitable relief under § 502(a)(3)) *with Schwartz v. Gregori*, 45 F.3d 1017, 1022-23 (6th Cir. 1995) (holding that an employee who was discharged for filing an ERISA claim against her employer may recover back pay and front pay as appropriate

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[1/] *Amici's* brief only addresses Petitioner's question concerning relief for a § 510 violation under § 502(a)(3).

equitable relief under § 502(a)(3)); and between the Third and Ninth Circuits on the question presented by the Petitioners. *Compare Mathews v. Chevron Corp.*, 362 F.3d 1172, 1185-86 (9th Cir. 2004) (holding that requiring employer to modify its personnel records to change termination date, and therefore make plaintiffs eligible for special termination benefits, was appropriate equitable relief under § 502(a)(3)) *with Eichorn*, 484 F.3d 248 (rejecting the reasoning of *Mathews*).

More specifically, the *Eichorn* decision undermines ERISA's objective of protecting employees from employers who terminate their employees or take other actions to avoid paying benefits. *See Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1254-61 (10th Cir. 2004) (holding that back pay is not appropriate equitable relief under § 502(a)(3) where an employer violates ERISA by closing a plant to prevent plaintiffs' pension plans from vesting, even though no other relief is available due to employer delay and spoliation of evidence).

Although the conduct alleged here is the conduct Congress intended to prevent when it enacted § 510, if *Eichorn* is left standing, employers can violate ERISA with impunity. *Id.* Indeed, this decision leaves ERISA as the only employment statute with no anti-retaliation protections. A writ of *certiorari* is appropriate because the Third Circuit's decision renders § 510's protections nugatory. It makes little sense for Congress to enact a statutory provision which allegedly protects against involuntary termination to interfere with the attainment of benefits if there is no ability to recover the lost benefits or related relief such as back pay.

Finally, the issue of the appropriate scope of equitable relief is currently before this Court, albeit in a different context. *See LaRue v. DeWolff, Boberg & Assoc., Inc.*, 450 F.3d 570 (4th Cir. 2006), *reh'g en banc denied*, 458 F.3d 359 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2971 (June 18, 2007) (No. 06-856) (holding that a participant may not recover monetary loss to his account caused by a plan fiduciary's failure to follow his explicit plan investment instruction as appropriate equitable relief under § 502(a)(3)); *see also Goeres v. Charles Schwab & Co., Inc.*, 220 Fed.Appx. 663, 2007 WL 495191 (9th Cir.

Feb. 14, 2007), *petition for cert. filed*, 75 U.S.L.W. 3637 (May 15, 2007) (No. 06-1521) (holding a plan beneficiary may not recover monetary loss to his account caused by the employer's refusal to turn over his funds even after numerous requests as equitable relief under § 502(a)(3)). This case would provide the Court with the opportunity to look at the issue of remedies under § 502(a)(3) more globally and respond to the rising chorus of judicial and scholarly concern.[2/] Thus, the issue presented by Petitioners affects both a substantial number of plans and their covered participants.

In light of the significance of the issues presented by this case and the impact on AARP members and other workers, AARP and NELA respectfully request that the Court grant this motion to file their brief *amici curiae*.

Respectfully submitted,

Terisa E. Chaw
National Employment
Lawyers Association
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

Stephen Bruce
805 15th Street, NW
Suite 210
Washington, D.C. 20005
(202) 371-8013

Counsel for *Amicus Curiae*
NELA

Mary Ellen Signorille*
AARP Foundation Litigation

Melvin R. Radowitz
AARP

601 E Street, NW

Washington, D.C. 20049
(202) 434-2060

Counsel of Record*
Counsel for *Amicus Curiae*
AARP

[2/] *See, e.g., Aetna Health Inc., v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring); *Eichorn v. AT&T*, 489 F.3d 590 (Ambro, J., concurring); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring). See these decisions for representative scholarly articles discussing ERISA remedies.

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STATEMENT OF INTEREST[1/]

The interest of *amici* is set forth in the accompanying motion for leave to file this brief.

ARGUMENT

I. RELIEF UNDER § 510 OF ERISA INCLUDES MORE THAN MERELY INJUNCTIVE RELIEF.

A. *Mertens, Great-West* and *Sereboff* Do Not Control the Analysis in this Case Because Employment Discrimination and Anti-Retaliation Statutes Did Not Exist at Common Law or in the Days of the Divided Bench.

ERISA § 502(a)(3) permits participants to obtain "appropriate equitable relief" against any defendant, including an employer, to redress violations of § 510. 29 U.S.C. § 1132(a)(3); *see also Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.* , 530 U.S. 238, 246-47 (2000). In other contexts, the Court has limited "equitable relief" under § 502(a)(3) to "those categories of relief that were *typically* available in equity." *Mertens v. Hewett Assoc.*, 508 U.S. 248, 256 (1993) (emphasis in original); *accord Great-West Life & Annuity Ins. Co. v. Knudsen* , 534 U.S. 204, 210 (2002); *Sereboff v. Mid Atl. Med. Servs., Inc.* , 126 S. Ct. 1869, 1873 (2006). However, none of the Court's precedent concerning remedies under § 502(a)(3) – *Mertens*, *Great-West*, and *Sereboff* – considered appropriate equitable relief in the context of a § 510 case and none held what relief was available under that section. Although there is *dicta* in *Great-West*, 534 U.S. at 218 n.4, concerning the scope of relief in § 510 cases, the Court may have been merely "flagging the issue." *See Harris Trust & Sav. Bank*, 530 U.S. at 249 (*dicta* in *Mertens* of ability to

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[1/] No counsel for any party authored any portion of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

bring individual claims under § 502(a)(3) was merely "flagging [of] issue"). Neither *Mertens*, *Great-West* nor *Sereboff* controls this case.[2]

The issue in *Mertens* was whether a non-fiduciary who knowingly participated in a fiduciary breach was liable to the plan under § 502(a)(3) for losses resulting from such breach. 508 U.S. at 251. The Court's analysis of that question focused on whether the phrase "appropriate equitable relief" in § 502(a)(3) encompassed compensatory or money damages. *Id.* at 255. The Court concluded that "appropriate equitable relief" under § 502(a)(3) does not include compensatory or money damages because that interpretation would render the term "equitable" superfluous. *Id.*

Great-West elaborated on the Court's position in *Mertens*, holding again that a general contractual claim against a non-fiduciary is a request for legal damages. 534 U.S. at 210. Because Great-West merely requested personal liability for the amount of the benefits provided to the plaintiffs, neither a constructive trust nor an equitable lien could be imposed on any specific property in the defendants' possession so that the requested relief did not meet the parameters of equitable restitution, and the suit was not cognizable under § 502(a)(3). *Id.* at 214, 221.

Similar to the facts in *Great-West*, *Sereboff* arose in the context of a claim for reimbursement of benefits to the plan on account of the participant's recovery from a third-party tortfeasor. 126 S. Ct. at 1872-73. In *Sereboff*, the plaintiff

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[2] Briefs file in *LaRue* and *Goeres v. Charles Schwab & Co., Inc* ., 220 Fed.Appx. 663, 2007 WL 495191 (9th Cir. Feb. 14, 2007), *petition for cert. filed*, 75 U.S.L.W. 3637 (May 15, 2007)(No. 06-1521), suggest that the Court should overrule *Mertens* and its progeny. *Amicus* Brief of NELA in Support of Petitioners in *LaRue v. DeWolff, Boberg & Assoc., Inc.*,450 F.3d 570 (4th Cir. 2006), *reh'g en banc denied*, 458 F.3d 359 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2971 (June 18, 2007) (No. 06-856); Brief of Petitioner in *Goeres*. Both "recognize that [the] prior attempt to construe the phrase ["equitable relief"] does not give [] much help here." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

sought specifically identifiable funds over which a constructive trust or equitable lien could be placed. *Id.* at 1871. Relying on case law from the days of the divided bench, the Court held that the basis for the relief sought was clearly characterized as equitable–an equitable lien by agreement. *Id.* at 1874-75.

In none of these cases did the Court resolve how to classify statutory claims, such as employment discrimination and anti-retaliation claims, or remedies, such as back pay, which were unknown at common law and did not exist in either courts of law or courts of equity. The back pay discussion in footnote 4 of *Great-West* supports this analysis. *Great-West,* 534 U.S. at 218 n.4. Significantly, the Court refrained from stating that the statutory claim of employment discrimination and its related remedies, such as back pay and payment of benefits, were not available in courts of equity . Instead, the Court noted that back pay was an equitable remedy when awarded under Title VII as "an integral part of an equitable remedy." *Id.* (internal citations and quotation marks omitted); *accord, Bowen v. Massachusetts.*, 487 U.S. 879, 893 (1988) ("Our cases have long recognized the distinction between an action at law for damages . . . and an equitable action for specific relief – which may include an order providing for the reinstatement of an employee with backpay").

Moreover, none of the "standard current works such as Dobbs, Palmer, Corbin, and the Restatements" respond to the question of the equitable nature of back pay or back benefits because these standard works deal only with common law claims and remedies, not statutory claims and remedies. *Great-West*, 534 U.S. at 217. Only Dobbs attempts to characterize these claims and reaches no concrete conclusion . *Compare* 2 DAN B. DOBBS, LAW OF REMEDIES § 6.10(5) at 226 (2d ed. 1993) ("Reinstatement in a job appears to be equitable because such relief is essentially injunctive. But back pay seems on the surface to be an ordinary damages claim . . . . On the basis of such observations, it would seem that a reinstatement claim standing alone would be tried to the judge without a jury while a back pay claim standing alone would be tried to a jury if one is demanded. . . . But in fact the cases do not yield up any such single conclusion") (hereafter "DOBBS") *with* 2 DOBBS

§ 6.10(1) at 193 ("back pay and reinstatement remedies are usually considered equitable").

Reinstatement of an employee was, and is, disfavored at common law because of the inevitable friction between an employer and employee where the work relationship has soured. 3 DOBBS § 12.21(4) at 489 ("courts will not specifically enforce a personal services contract in favor of either party. As to employment itself, the general rules leaves the employee to a claim for damages or restitution."); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981) (specific performance employment contracts disfavored). Clearly, reinstatement and back pay were not available remedies at common law. Accordingly, *Mertens, Great-West* and *Sereboff* do not control this case because statutory employment discrimination and remedies such as back pay and lost benefits were not in existence at common law. Instead, the Court should use a different paradigm to determine the meaning of "appropriate equitable relief" for § 510 claims.

B. Congress Specifically Enacted § 510 To Effectively Protect Employees from Improperly Motivated Termination and to Ensure They Could Obtain Meaningful Relief.

To safeguard the rights provided by ERISA, Congress enacted § 510, which is ERISA's anti-retaliation and anti-discrimination provision, and § 502(a)(3), which permits individuals to sue for § 510 violations and obtain equitable relief. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143 (1990). The Senate Report explains the reasons that Congress believed enactment of § 510 was necessary to complement ERISA's other protections:

> These provisions were added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectation of those rights were interfered with by the use of economic sanctions or violent

> reprisals. Although the instances of these occurrences are relatively small in number, the Committee has concluded that safeguards are required to preclude this type of abuse from being carried out and in order to completely secure the rights and expectations brought into being by this landmark reform legislation.

S. REP. NO. 93-127, at 36 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4872.[3]

The Court and the circuit courts have taken Congress' intent to confer such protections to heart. Indeed, the Court has stated:

> By its terms section 510 protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting. Congress viewed this section as a crucial part of ERISA, because, without it, employers would be able to circumvent the provision of promised benefits. S. REP. NO. 93-127, at 35-36 (1973); H.R. REP. NO. 93-533, at 17 (1973).

Ingersoll-Rand, 498 U.S. at 143. Quite simply, "the overarching goal of the statute was to protect rights conferred

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[3] Prior to ERISA's enactment, employers had an incentive to terminate employees before they became eligible for retirement because employees would forfeit their right to a pension if they were not employed at their time of retirement. *See generally* James A. Wooten, *The Most Glorious Story of Failure in the Business: The Studebaker-Packer Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 694 (Spring/Summer 2001)(recounting the historical basis for ERISA's passage).

by an employee benefit plan . . . ." *Mattei v. Mattei*, 126 F.3d 794, 800 (6th Cir. 1997); *accord, Heimann v. Nat'l Elevator Indus. Pension Fund*, 187 F.3d 493, 507 (5th Cir. 1999).

The Court emphasized that "section 510 helps make these [employer's] promises [of benefits] credible." *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 516 (1997). However, without the full panoply of relief, including reinstatement into the plan, the lost benefits themselves, back pay, front pay or reinstatement into the job as a remedy for a violation of § 510, the Court's rationale in *Inter-Modal* is undermined because the law will provide no deterrent effect upon employers terminating participants for the purpose of interfering with their rights to benefits. Instead, the incentive for employers is to prolong litigation in order to delay reinstatement and avoid paying discharged employees, at least some of whom who will be deceased or past normal retirement age upon judgment. *See Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004). Indeed, if even reinstatement to the plan or lost benefits is not a remedy for terminations found violative of § 510, the statute engenders a type of "absurd or glaringly unjust" result, rendering the protections of § 510 nugatory. *See Inter-Modal*, 520 U.S. at 516.

C. Because § 502(a)(3)'s Term "Relief" Is Qualified by the Terms "Appropriate" And "Equitable," "Equitable Relief" under § 502(a)(3) Is Discretionary – Regardless Whether the Relief Is Reinstatement, Front Pay, Back Pay or Payment of Lost Benefits – and Thus Can Be Read to Provide the Relief That Congress Intended to Be Available Under § 510.

If an alleged wrong cannot be remedied later, then the courts should be issuing preliminary injunctions against alleged § 510 violations. "Section 510, . . . unlike other anti-discrimination provisions, is designed to prevent injury to employees' protected rights, not simply to redress the injury after the goals of a discriminatory plan have been effectuated."

Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir. 1987). *Amici* note however, that the issuance of temporary restraining orders and injunctions are rare in these cases. *E.g.*, *Pollack v. FreightCar America, Inc.*, No. 3:07-201, 2007 WL 2406946 (W.D. Pa. Aug. 21, 2007) (post-*Eichorn* order denying in part plaintiff's motion for temporary restraining order). Even though movants may be able to show irreparable harm,[4] courts are reluctant to issue injunctive relief due to the complexity of these cases:

> Because of the complexity of much ERISA litigation (not to mention the shortage of federal judges), it tends to move slowly. The very predicate of an interference claim is that the defendant is keeping the plaintiff from benefits to which he would otherwise be entitled. The longer that interference continues, the less likely it is that injunctive relief will provide a workable remedy. . . . The end result is that for plaintiffs like Eichorn the case is won or lost at the preliminary injunction stage, for only that remedy will prevent the case becoming moot while discovery proceeds.

Eichorn v. AT&T, 489 F.3d 335, 593 (3d Cir. 2007) (Ambro, J.,

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[4] Two of the factors which a court must consider when addressing a motion for preliminary injunction is whether the movant can demonstrate a reasonable probability of success on the merits, *Crissman v. Dover Downs Entm't., Inc.*, 239 F.3d 357, 364 (3d Cir. 2001), and irreparable harm that is "potentia' harm which cannot be redressed by a legal or an equitable remedy following a trial." *Instant Air Freight Co. v. C.F. Air Freight, Inc .*, 882 F.2d 797, 801 (3d Cir. 1989). *Cf. Shegog v. Board of Educ . of City of Chicago*, 194 F.3d 836, 839 (7th Cir. 1999) (plaintiffs not entitled to preliminary injunction where they "can receive complete relief in the final judgment").

concurring). Another reason is that employers have no reason to comply with court orders. Indeed, *Millsap v. McDonnell Douglas Corp.*, 162 F. Supp. 2d 1262, 1308-10 (N.D. Okla. 2001), *rev'd in part*, 368 F.3d 1246 (10th Cir. 2004), in which the court found the employer had engaged in spoliation of evidence and other discovery abuses, reaped the reward for its actions–no reinstatement of employers and no payment of back pay. *Millsap* gives employers a roadmap for using delay and abuses to shield their illegal actions from consequence. This is exactly the opposite of what Congress intended when it enacted § 510.

Amici suggest that the language of the statute itself provides a method to effectuate Congress' intent and purpose. Section 502(a)(3) states that participants may obtain "appropriate equitable relief." The Court has not fully interpreted the meaning of "appropriate" in its cases. In *Varity*, the participants were seeking, among other things, reinstatement into the plan, and the Court discussed whether such relief was appropriate equitable relief under § 502(a)(3) and concluded that it was. *See Varity Corp. v. Howe* , 516 U.S. 489, 495 (1996). Significantly, in *Great-West*, the Court acknowledged that it was undisputed that reinstatement into the plan in the *Varity* case was equitable relief under § 502(a)(3). 534 U.S. at 221 n.5.

This Court has interpreted § 502(a)(3)'s reference to "equitable relief," as limited to traditional equitable relief and excluding any type of compensatory relief. *Mertens*, 508 U.S. at 256; *accord Sereboff*, 126 S. Ct. at 1873; *Great-West*, 534 U.S. at 210. In *Varity*, the Court interpreted the term "appropriate," which immediately precedes "equitable relief" as a modifier of the term "equitable relief"–there, a limitation on equitable relief, holding that even traditional equitable relief may not be appropriate where a plan participant has a viable claim under § 502(a)(1)(B). 516 U.S. at 515. The Court concluded that reinstatement into the plan is appropriate equitable relief under § 502(a)(3). *See Varity*, 516 U.S. at 495; *accord Great-West*, 534 U.S. at 221 n.5 (acknowledging reinstatement into the plan as appropriate equitable relief under § 502(a)(3)).

Here, *amici* urge the Court to interpret the word "appropriate" to keep § 510 from being toothless. Congress meant to prevent employers from interfering with plan benefits, not to make such interference a profit center. The addition of the word "appropriate" means that Congress expected that sometimes even limited traditional equitable relief would be too much relief, *Varity*, 516 U.S. at 495, and sometimes it would not be enough. The only other interpretation of the term "appropriate" is that Congress included it in the expectation that courts would otherwise believe Congress was authorizing "inappropriate" equitable relief. This makes no sense.

Like the participants in *Varity*, Petitioners here must rely on § 502(a)(3) or have no remedy at all. There is no "ERISA-related purpose that denial of a [meaningful] remedy would serve." *Varity*, 516 U.S. at 515.

D. Because § 510 Is Modeled after Other Labor and Employment Statutes, Equitable Relief Should Be Interpreted Consistently with These Statutes.

When interpreting the meaning of a statute, the courts should presume that Congress legislated against the backdrop of existing law. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979). "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard v. Pons*, 434 U.S. 575, 582 (1978) (quoting *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 59 (1911)). Because ERISA was modeled in part on both the National Labor Relations Act (NLRA) and Title VII, ERISA should be interpreted consistently with those statutes where they are analogous. And, although the legislative history of ERISA does not explicitly enumerate the specific remedies meant to be included within the scope of "appropriate equitable remedies," the legislative histories of the NLRA and Title VII are instructive.

During Congressional statements, the protections under

§ 510 were analogized to § 8(a)(3) of the National Labor Relations Act (NLRA). *See* 119 CONG. REC. 30374, *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, PUB. L. NO. 93-206 (Comm. Print 1976) at 1774-75 (statement of Sen. Hartke) ("[[t]he language of ERISA section 510] parallels section 8(a)(3) of the National Labor Relations Act"). Remedies for violations of § 8(a)(3) are generally reinstatement, back pay, and cease and desist orders. Charles J. Morris, THE DEVELOPING LABOR LAW, *Discrimination in Employment* 263 (2d ed. 1983). The purpose of such remedies is to restore employees to the position they would have been in but for the employer's violation of the law. *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938) ("The power [of the NLRB] to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where the consequences are of a kind to thwart the purposes of the Act."). Accordingly, in the typical discrimination case under the NLRA, the National Labor Relations Board will normally order reinstatement with back pay as an equitable remedy. *See* 2 Patrick Hardin, THE DEVELOPING LABOR LAW 1833, 1838 (3d ed. 1992); *see also In re Chase Nat'l Bank of N.Y.* , 65 N.L.R.B. 827, 829 (1946).

Similarly, in a colloquy discussing the protections of § 510, Senator Javits emphasized that § 510 "gives the employee the same rights" and "provid[es] a remedy for any person fired such as is provided for a person discriminated against because of race or sex, for example." 119 CONG. REC. 30044, *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, PUB. L. NO. 93-206 (Comm. Print 1976) at 1641-42 (statement of Sen. Javits). These similarities between ERISA and Title VII are also evident in the statutes' text; both prohibit "unlawful discharge" of employees. *Compare* 29 U.S.C. § 1140 ("It shall be unlawful for any person to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provision of an employee benefit plan .

. . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan") *with* 42 U.S.C. § 2000e-2 ("It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin"). Furthermore, Congress amended Title VII in 1972 to permit the courts to grant "any other equitable relief as the court deems appropriate" shortly before enacting ERISA. *See* 42 U.S.C. § 2000e-5(g).

Even looking beyond the immediate understanding of Congress during ERISA's enactment, back pay and reinstatement fit logically within historical conceptions of equitable relief because no jury trial is available for these types of claims. *See* 2 DOBBS § 6.10(1) at 163 (noting that "back pay and reinstatement remedies are usually considered equitable. For this reason there was no jury trial right under Title VII before 1991, and still may be no jury in some instances"); *see also Curtis v. Loether*, 415 U.S. 189, 197 (1974) (noting that the circuit courts have held that back pay under Title VII is an equitable remedy not requiring a jury trial). For the same reason,[5/] back pay and reinstatement are also considered equitable remedies under a range of remedial statutes in addition to Title VII and the NLRA, including the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, *see, e.g., Mitchell v. Robert De Mario Jewelry. Inc.*, 361 U.S. 288, 295-96 (1960); Section 1981, 42 U.S.C. § 1981, *see, e.g., Earlie v. Jacobs*, 745 F.2d 342, 344 (5th Cir. 1984); *Moore v. Sun Oil Co. of Pa.*, 636 F.2d 154, 156 (6th Cir. 1980) (plaintiff is not entitled to a jury trial on the equitable issue of back pay); and Section 1983, 42 U.S.C. § 1983, *see, e.g., Bertot v. Sch. Dist. No. 1, Albany Cty., Wyo.*, 613 F.2d 245, 250 (10th Cir. 1979).

With such overwhelming historical evidence that back pay and reinstatement should be considered equitable remedies, to hold otherwise under § 510 without a clear indication that

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[5/] The Civil Rights Act of 1991, 105 Stat. 1071, S. Res. 1745, 102d Cong. (1991) (enacted), now permit cases to be tried in front of jury with the authority to award compensatory and punitive damages. 42 U.S.C. § 1981(c).

ERISA was meant to be an exception to the general rule in this regard would be illogical and inconsistent with history and precedent. *See Mitchell*, 361 U.S. at 291.

Indeed, *Mertens* affirmed this interpretation of "appropriate equitable relief" in § 502(a)(3) by looking at Title VII. *Mertens*, 508 U.S. at 255 n.5. Furthermore, in *Great-West*, the Court reaffirmed that back pay is available under Title VII when it is "an integral part of an equitable remedy" or is "awarded together with equitable relief." *Great-West*, 534 U.S. at 218 n.4 (internal citations and quotation marks omitted). Although *Millsap* cited the *Great-West dicta* in footnote four as precluding an award of back pay under § 502(a)(3), it actually supports the opposite conclusion: by affirming that back pay is an equitable remedy when it is an "integral part of an equitable remedy." *Id.* Reinstatement is an equitable remedy, and thus back pay also is equitable when awarded as an integral part of reinstatement.

Furthermore, nearly every circuit court to consider the issue after *Mertens* has held that back pay is an appropriate equitable remedy for a § 510 violation. *See e.g.*, *Schwartz v. Gregori*, 45 F.3d 1017, 1022-23 (6th Cir. 1995) (awarding back pay as a remedy for a § 510 violation and noting that though "restitution generally is awarded to prevent unjust enrichment to the defendant, this is not required in every case" and that a court may restore the plaintiff to the pre-discrimination status-quo "either by return of something which he formerly had or by the receipt of its equivalent in money"); *Gerbec v. United States*, 164 F.3d 1015, 1023 (6th Cir. 1999) (noting that "*Mertens* allows only equitable relief which would mean back-pay and not tort-type relief"); *Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331, 336 (2d Cir. 1997) (holding that back pay, restitution and reinstatement are available remedies for a § 510 violation). *But see Millsap v. McDonnell Douglas Corp.*, 368 F.3d at 1260 (holding that back pay was not an appropriate equitable remedy for a § 510 violation). Even when the employee cannot be reinstated, back pay remains an equitable remedy because it is within the court's broad powers in equity to make an injured party whole. *See Marks v. Prattco, Inc.*, 607 F.2d 1153, 1155 (5th Cir. 1979)

(reinstatement not a precondition to court-ordered back pay).

In addition, the majority of circuit courts have also analogized § 510 to labor statutes for other purposes. For purposes of the statute of limitations, circuit courts have used the most analogous state statute of limitations, depending on the type of claim and rights at issue. Where a discharge claim is involved, the circuit courts have used state "wrongful termination" or "retaliatory discharge" labor statutes. *See generally* EMPLOYEE BENEFITS LAW, at 1174 (Steve Sacher *et al.* eds., 2d ed. 2000); EMPLOYEE BENEFITS LAW (2006 CUM. SUPP.), at 1022 (Jane Kheel Stanley *et al.* eds., Cum. Supp. 2006). In determining the proper burden shifting in § 510 cases for plaintiffs relying upon circumstantial evidence, the majority of circuit courts have adopted the burden shifting framework used in Title VII employment discrimination claims. *See generally* EMPLOYEE BENEFITS LAW, at 1168-72;EMPLOYEE BENEFITS LAW (2006 CUM. SUPP.) at 1022. Other courts have looked to the NLRA and employment discrimination statutes to determine whether the doctrine of constructive discharge states a cause of action under § 510. *E.g., Lojek v. Thomas*, 716 F.2d 675, 681 (9th Cir. 1983).

Given the clear purpose of the Act to protect participants from discriminatory discharge, the analogies drawn by Congress between the protections and remedies afforded participants by § 510 and other labor and employment statutes, and ERISA's statement of policy that it was to provide "appropriate remedies," Congress did not need to specifically spell out that back pay was included as a form of equitable relief. "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell*, 361 U.S. at 291-92 (providing for the restoration of lost wages in a Fair Labor Standards Act case). Indeed, absent a clear command by Congress that a statute providing equitable relief excludes certain forms of relief, a court should presume that it has the discretion to exercise the full scope of equitable powers. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("unless otherwise provided by statute," or "by a

necessary and inescapable inference". . . . "[t]he great principles of equity, securing complete justice should not yield).

E. Reinstatement Into a Job or a Plan is Equitable Relief Because Equitable Remedies Include Those Remedies Which Force a Defendant to Act or Cease from Acting in a Certain Manner.

Although *amici* have discussed all potential remedies for a § 510 violation, including back pay, the immediate issue raised by petitioners is whether reinstatement of plaintiff's bridging rights is within a court's equitable powers. Equity enables the court to devise and shape relief according to the unique circumstances of the case. 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 109, at 140-41 (Spencer W. Symons ed., 5th ed. 1941) [hereinafter POMEROY]. Usually, equity grants a personal order to the defendant to stop interfering with the plaintiff's economic opportunities *See also* 1 DOBBS §§ 2.1(1), (2), at 56, 59. Such relief is enforced by an order of contempt. *Id.* This historical understanding of equity aligns itself directly with the Court's interpretation of Congress' intent when it enacted ERISA to protect the interests of participants.

The most common equitable remedies available are coercive remedies which force a defendant to act or cease from acting in specified ways. DOBBS § 2.1(2), at 59. This element of compulsion or coercion is a typical characteristic of equity. *Id.* § 2.1(2), at 62 ("Whether the equitable remedy is called restitution, interpleader or specific performance, then, at root it is commonly an injunction in some form."). Further, when courts and lawyers use the term "equitable," it is understood to mean "the plaintiff has sought an equitable remedy, usually one involving coercive elements." *Id.* § 2.1(3), at 65-66.

The Court has recognized that such coercive remedies in ERISA cases provide equitable relief. *See Varity*, 516 U.S. at 495 (reinstatement into plan is appropriate equitable relief under § 502(a)(3)); *accord*, *Great-West*, 534 U.S. at 221 n.5 (reinstatement into plan in *Varity* was equitable relief under

§ 502(a)(3)).

Moreover, other courts have ordered defendants to permit participants to meet the eligibility requirements for plan benefits where the defendants have prevented the participants from meeting such requirements, not unlike this case. The courts have made it clear that they will not permit defendants to profit from their misdeeds. Thus, in*Swaback v. Ameritech*, 103 F.3d 535, 542-43 (7th Cir. 1996), the court ordered the plan to pay a lump sum benefit, where a plaintiff ill with cancer was told that he could not receive a lump sum without returning to work, even though that was contrary to the plan terms. The court held that but for the employer's misrepresentations, the plaintiff would have taken the necessary steps to fill out the enrollment form for benefits. *Id.* at 543-44; *accord, Epright v. Envtl. Res. Mgmt. Inc. Health & Welfare Plan*, 81 F.3d 335, 341 & n.1 (3d Cir. 1996) (but for the employer's erroneous interpretation of the plan, plaintiff would have completed enrollment forms; employer should not be permitted to benefit from its own mistake).

Here, the nature of one of the requested remedies is coercive which is typical equitable relief. Petitioners are requesting the defendants to take certain actions to enable them to become eligible for their bridging rights to determine whether they may obtain benefits under the plan. D OBBS § 2.6(3), at 155. Each participant will still have to file a claim for benefits in order to obtain the benefits to which s/he is entitled. If the defendant denies the participant's benefits or calculates an amount which is less than the participant believes s/he is entitled to the participant will have to file a § 502(a)(1)(B) claim.[6/] *Cf. Rush-Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 380 (2002) (in order to obtain benefits after prevailing under a statutory external review process, participants must still file suit for benefits under § 502(a)(1)(B)).

[6/] There are many factors that implicate a participant's eligibility for and amount of benefits, including salary and years of service. Defendant may have adequate reasons to deny the benefit or calculate an amount different than that which the participant believes that he or she is entitled.

II. THE COURT SHOULD REQUEST THE VIEWS OF THE SOLICITOR GENERAL.

If the Court has reservations about granting the Petition, *amici* respectfully suggest that the Court should invite the Solicitor General to express the views of the United States. As noted in the Petition, in the Secretary of Labor's *amicus* brief in *Millsap*, 368 F.3d 1246, the Secretary argued that equitable relief as a remedy for violations of § 510 included back pay. Because the Secretary has primary authority to interpret and enforce the provisions of Title I of ERISA, 29 U.S.C. §§ 1132, 1135, *amici* believe that the Solicitor General should be called upon to resolve any uncertainty regarding the propriety of further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Terisa E. Chaw
National Employment
Lawyers Association
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

Mary Ellen Signorille*
AARP Foundation Litigation

Melvin R. Radowitz
AARP

601 E Street, NW
Washington, D.C. 20049
(202) 434-2060

Stephen Bruce
805 15th Street, NW
Suite 210
Washington, D.C. 20005
(202) 371-8013

Counsel of Record*

Counsel for *Amicus Curiae*
NELA

Counsel for *Amicus Curiae*
AARP

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